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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1961

No. 277

G. & H. TOWING COMPANY,
*Petitioner*

vs.

EDWIN E. JOHANSSON, KANSAS CITY BRIDGE COMPANY, MERRITT-CHAPMAN & SCOTT CORPORATION, and PELICAN ISLAND DEVELOPMENT CORPORATION,
*Respondents*

## RESPONDENTS EDWIN E. JOHANSSON, KANSAS CITY BRIDGE COMPANY, MERRITT-CHAPMAN & SCOTT CORPORATION, AND PELICAN ISLAND DEVELOPMENT CORPORATION'S REPLY TO PETITION FOR WRIT OF CERTIORARI FILED HEREIN BY G. & H. TOWING COMPANY, PETITIONER

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**TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:**

Libellants in the Trial Court—Edwin E. Johans-

son, Kansas City Bridge Company, Merritt-Chapman & Scott Corporation, and Pelican Island Development Corporation—denying jurisdiction as to them and denying error respectfully pray that the petition of G. & H. Towing Company be denied.

The petition of Emmett Gray (Cause No. 276) and the petition of G. & H. Towing Company (Cause No. 277), we believe, both should have been filed by Petitioners in one case rather than splitting a single case into two separate causes, Nos. 276 and 277, in this Court. The case was tried in the Trial Court as a single case and was heard by the Court of Appeals in the same manner. Since, however, separate petitions have been filed here, we deem it necessary to answer separately. However, in order to give this Court the background on each petition, a considerable part of our Reply Statement and Argument will be identical in each cause.

## STATEMENT AND ARGUMENT

Libellants below, Edwin E. Johansson, Kansas City Bridge Company, Merritt-Chapman & Scott Corporation and Pelican Island Development Corporation (hereinafter referred to as Libellants), being all the parties jointly interested in two pipe lines across Galveston Channel, recovered judgment in the Trial Court in rem against the Motor Vessel HAR CANAAN (whose anchor caught and broke one of these lines and whose claimant is Maritime Overseas Corporation) and in personam against Emmett Gray for his negligence and against G. & H. Towing Company, as

the employer of Captain Gray, jointly and severally, for the damages sustained by reason of the negligent dropping of the HAR CANAAN'S anchor (R. 887). The Trial Court held that "Captain Gray was negligent in giving the order to drop the anchor when he should have been aware of the construction and presence of the pipe lines from general knowledge, the Notices to Mariners, and the prominent warning signs which were plainly visible" and "Captain Gray was not misled by the position of the warning signs and was neglig nt in giving the order to drop the anchor without regard to the presence of the pipe lines." (Findings Nos. 17 and 18, R. 883-884) and concluded that Captain Gray "is personally liable for his own acts of negligence" (Conclusion of Law No. 1 - R. 885). The Trial Court further found that "Captain Gray was acting within the scope and course of his employment by G. & H. Towing Company at all times material hereto, and was not a loaned servant to the vessel or her operators at such times" (Finding No. 20, R. 884) and concluded that "G. & H. Towing Company is liable for the negligence of Captain Gray as its employee" (Conclusion of Law No. 2 - R. 885). The HAR CANAAN was held liable in rem for the acts of Captain Gray (R. 885). Maritime Overseas Corporation (the claimant of the HAR CANAAN) concedes that if Captain Gray was negligent, the vessel is liable in rem.

Therefore, insofar as these Libellants are concerned, the case involves only fact questions as to the negligence of Captain Gray and his acting in the

course of his employment of G. & H. Towing Company.

Additionally, in the Trial Court, the HAR CANAAN and its claimant—Maritime Overseas Corporation (both hereinafter referred to jointly as Maritime) on one side and Captain Gray and the G. & H. Towing Company on the other side, extensively litigated the question of the so-called "pilotage clause" and the various rights of indemnity and contribution claimed between themselves. Libellants secured a judgment jointly and severally against the HAR CANAAN in rem, Captain Gray and the G. & H. Towing Company. We are not concerned with these various cross-claims as between these three parties.

The HAR CANAAN and its claimant, Maritime Overseas Corporation, appealed, claiming that Captain Gray was not negligent and, therefore, that the ship was not liable. The Court of Appeals on the fact question of negligence held against the Appellants, HAR CANAAN and Maritime Overseas Corporation. These Appellants did not file a motion for rehearing in the Court of Appeals and have not applied for certiorari here. We take it, therefore, that here as between us (Libellants below) and the HAR CANAAN in rem and Maritime Overseas Corporation as claimant, there is no question in dispute or controversy.

G. & H. Towing Company took its appeal and while complaining in part as to the Trial Court's finding of fact that Captain Gray was negligent and an employee of G. & H. Towing Company, primarily argued the effect of the pilotage clause and the indem-

nity features between it, G. & H. Towing Company, and Maritime. Captain Emmett Gray also appealed, contending that under the pilotage clause, he was entitled to some form of exoneration and second, that he was not negligent. The Court of Appeals affirmed the Trial Court's findings of fact to the effect that the Appellant, Captain Emmett Gray, was negligent and that he and his employer, G. & H. Towing Company, were liable to us.

The Court of Appeals further held that Maritime was entitled to indemnity over against Gray and G. & H. Towing Company. Again, we are not interested in a controversy between Gray and the G. & H. Towing Company on the one hand and Maritime on the other.

The Petition for Certiorari here primarily deals with the controversy between Petitioner and the HAR CANAAN in rem and its claimant, Maritime Overseas Corporation.(1)

We cannot accept the "Statement" made in the petition as accurate in that it ignores most of the facts favorable to us, but in view of the limited argument made against us and our reply here, we do not believe that it would materially benefit this Court to make a more complete and accurate statement. If the Court

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(1) Strangely enough, while we are only involved in a minor way, we are named as the sole Respondents in the petition. Maritime Overseas Corporation and the HAR CANAAN are the parties against whom practically everything in the petition is directed but were not made or named as Respondents in the petition.

desires a more complete statement, we refer to Pages 1 to 39 of our Brief in the Court of Appeals.

With one possible exception, the reasons asserted in the petition for granting the writ and the argument all deal with the question of validity of the pilotage clause and of indemnity and contribution between petitioner, G. & H. Towing Company and the HAR CANAAN and its claimant, Maritime Overseas Corporation.

Answering the only part of the petition possibly directed against us—on Pg. 27 of the petition, it is argued that Captain Gray was a loaned servant and that the G. & H. Towing Company should not be liable as his employer. While this argument is based in substance on the pilotage clause by which we are not bound, if it is to be regarded as an argument against liability as to us, the record furnishes a clear answer. As to us, we were not parties to the pilotage clause and, therefore, are not bound by it. The Trial Court found the facts clearly showing that Captain Gray was an employee of the Petitioner, G. & H. Towing Company, at the time of the actions complained of (Finding No. 12. R. 881) and concluded that the G. & H. Towing Company" is liable for the negligence of Captain Gray as its employee" (Conclusion of Law No. 2 - R. 884).

Additionally, Captain Gray testified that on March 21, 1958, he was Port Captain for G. & H. Towing Company (R. 157); that he worked for G. & H. Towing Company from 1927 until 1935 and left them

in 1935 and returned to work for them in 1945 and had been working for them ever since (R. 158); that the orders to move ships came to Pier 10 office of G. & H. Towing Company and that he was in charge of a part of this office (R. 161); that on the occasion in question, he was not at Pier 10 when the order was received to move the ship but when he arrived back at Pier 10, his assistant said "you got another ship to go"; that he then took three tugs and went over to the location of the HAR CANAAN (R. 162).

Captain Gray further testified that he became Port Captain in March, 1958 (R. 821); that G. & H. Towing Company paid him compensation as a Port Captain but he also received compensation for every dead ship he handled; that when he became Port Captain, he also automatically became G. & H. Towing Company's dead ship pilot because that was a part of the Port Captain's job; that his extra fees for dead ship pilot work were also paid him by G. & H. Towing Company (R. 822); and that the dead ship piloting was a part of his job for G. & H. Towing Company (R. 824).

The witness, F. D. Harlan, Vice-President and Secretary of G. & H. Towing Company, testified that G. & H. Towing Company employs the dead ship pilots who are on its payroll as such; that this job usually carries the title of Port Captain; that the G. & H. Towing Company's Port Captain is in charge of the dispatching office and has the duty of acting as dead ship pilot with a monthly compensation (R. 786); that

when the Port Captain, such as Captain Gray, would act as dead ship pilot he receives additional compensation; that G. & H. Towing Company charged an extra $60.00 for Captain Gray's acting as a dead ship pilot of which amount Captain Gray received $20.00; G. & H. Towing Company received 65 % of the remaining $40.00 and the particular contracting towing company (in this case—Bay-Houston) would receive 35% of the remaining $40.00 (R.795).

Captain Gray gave the order to drop anchor (R. 208-209).

Under these facts, Captain Gray was a full time employee of G. & H. Towing Company as a port Captain. His services as a dead ship pilot for the towing company was an essential part of his duties and G. & H. received a substantial part of the extra charge made for Captain Gray's services. Therefore, as a matter of fact, G. & H. Towing Company is liable for the negligent acts of Captain Gray by reason of the employer-employee relationship. As to us, the provisions of the pilotage clause were not effective and, as to us, G. & H. Towing Company is liable as employer for the negligence of its employee or servant, Captain Gray. Each time this particular question has been raised as to third parties such as us, it has been held that liability exists. Perhaps the fullest discussion of the question is found in **People of the State of California vs. The Jules Fribourg**, 140 Fed. Supp. 333 (D.C. N.D. Cal. 1956 and cases cited there), and in **Pennsylvania Railroad Co. vs. The S. S. Beatrice**, 161

Fed. Supp 136 (D. C. S. D. N. Y. 1958). We submit that the holdings of these cases, and the cases cited therein, are correct. In view of the fact that the petition of G. & H. Towing Company only incidentally raises this question and is obviously directed primarily to the indemnity and contribution controversy between it and the HAR CANAAN and its claimant, Maritime Overseas Corporation, no further citation will be made on this point.

We, therefore submit, that as to us, the petition should be denied. Again, we are not interested in the controversy betwee nG. & H. Towing Company and Maritime as to indemnity and contribution. There are no substantial questions of law involved as between Petitioner and us and we submit no basis for the granting of a writ here.

If any questions of law are presented here, they are limited to the controversy between Petitioner G. & H. Towing Company on the one side, and Maritime on the other as to indemnity and contribution. The HAR CANAAN and Maritime are the real Respondents here—not us.

## CONCLUSION

The Respondents, Edwin E. Johanson, Kansas City Bridge Company, Merritt-Chaptman & Scott Corporation and Pelican Island Development Corporation, respectfully pray that the petition of G. & H. Towing Company be denied, and in the alternative that any grant of certiorari be limited to the controversy between such Petitioner and the HAR CANAAN and Maritime Overseas Corporation.

Respectfully submitted,

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*Attorneys for Respondents, Edwin E. Johansson, Kansas City Bridge Company, Merritt-Chapman & Scott Corporation, and Pelican Island Development Corporation.*

## CERTIFICATE

I certify that a copy of the foregoing Respondents Edwin E. Johansson, Kansas City Bridge Company, Merritt-Chapman & Scott Corporation, and Pelican Island Development Corporation's Reply to Petition for Writ of Certiorari has been mailed on the 22 day of August. 1961, to Mr. Robert Eikel, 1910 Tennessee Building, Houston 2, Texas, Attorney for Emmett Gray and for Petitioner G. & H. Towing Company, and Eastham, Watson, Dale & Forney, 538 Mellie Esperson Building, Houston, Texas, Attorneys for Respondent, Maritime Overseas Corporation, Claimant of the M/V HAR CANAAN.

Preston Shirley

Preston Shirley